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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>JOSE RICARDO VILLASENOR, JR.,<br>Defendant and Appellant. | A155102<br><br>(Contra Costa County Super. Ct. No. 05-170457-6) |

Defendant Jose Ricardo Villasenor, Jr., appeals from the trial court's judgment revoking his probation and executing a previously imposed sentence of three years in state prison. Villasenor argues on appeal that the trial court failed to exercise its discretion to consider reinstatement of probation before executing his prison sentence, neglected to articulate a statement of reasons for its sentencing decision, and violated his due process rights by refusing to allow defense counsel to file a sentencing memorandum prior to sentencing. We conclude the trial court properly exercised its sentencing discretion and affirm.

## I. BACKGROUND

In January 2017, Villasenor's parents informed police that Villasenor had threatened to kill them and himself with a knife in February 2016. Villasenor reported believing that his parents were members of the Mexican Mafia who had hurt people and who kept the injured and dead in their home. Villasenor left numerous messages for his mother in which, while screaming and yelling, he threatened to torture her, pour gasoline

down her throat and tape her mouth shut, cut into her with a knife, and murder her. Villasenor also left voicemail messages threatening to kill his brother, brother's wife, and brother's unborn child.

Based on this ongoing pattern of behavior, the Contra Costa County District Attorney filed an information in March 2017 charging Villasenor with 18 counts of making criminal threats. (Pen. Code,[1] § 422, subd. (a).) On June 29, 2017, pursuant to a negotiated disposition, the prosecution amended the information to add one count of stalking (§ 646.9, subd. (a)), and Villasenor pleaded no contest to that count. All remaining counts were dismissed.

Villasenor was sentenced to three years in state prison, but execution of the sentence was suspended and he was placed on three years of formal probation. The court commented: "So you know what's gonna happen if you violate probation." Villasenor responded in the affirmative. As a standard condition of probation, Villasenor was ordered to obey all laws. He was therefore required to comply with a civil restraining order already in place for the protection of his parents and other family members.

Six months later, in December 2017, the Contra Costa County Probation Department petitioned to revoke appellant's probation, alleging that he had violated the terms of the restraining order. At the probation revocation hearing on August 10, 2018, Villasenor's father reported receiving a telephone call from his son in which he reminded Villasenor of the restraining order. Thereafter he received a text message and more than 20 telephone calls from Villasenor. Villasenor's mother also testified to repeated phone and text contacts from Villasenor. At the conclusion of the hearing, the court found true the allegation in the petition, revoked and terminated Villasenor's probation, and executed the three-year prison sentence. This appeal followed.

## II. DISCUSSION

Probation is "the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community under the supervision of a

[1] All statutory references are to the Penal Code unless otherwise specified.

probation officer." (§ 1203, subd. (a); see *People v. Cushway* (1987) 193 Cal.App.3d 776, 778 (*Cushway*).) Where, as here, a trial court imposes a specific sentence and then suspends its execution, "the message being conveyed is that the defendant is on the verge of a particular prison commitment." (*People v. Medina* (2001) 89 Cal.App.4th 318, 323.) Nevertheless, if a probation violation is found true and probation is revoked, "the trial court ha[s] three available options: to reinstate probation on the same terms; to reinstate probation with modified terms; or to terminate probation and commit the probationer to prison pursuant to the original sentence." (*People v. Latham* (1988) 206 Cal.App.3d 27, 29 (*Latham*).) Such decision "rests within the broad discretion of the trial court." (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1421 (*Bolian*).) A court's decision whether to reinstate or terminate probation " 'will not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary or capricious manner.' " (*People v. Downey* (2000) 82 Cal.App.4th 899, 909 (*Downey*).) An abuse of discretion may be found when the record discloses that the trial court misapprehends or is unaware of the scope of its discretionary authority to reinstate or modify probation. (*Bolian*, at p. 1421.)

Villasenor asserts on appeal that the trial court abused its discretion by failing to exercise it. He claims the court "gave no indication that it considered any other disposition," instead treating his state prison sentence as "predetermined and automatic." Citing *Downey*, *supra*, 82 Cal.App.4th 899, he argues that " '[f]ailure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal.' " (*Id.* at p. 912.)

*Downey*, however, is readily distinguishable. In that case, the trial court made a sentencing choice based on an express and incorrect understanding of the law. (*Downey*, *supra*, 82 Cal.App.4th at pp. 911–912.) Here, in contrast, the record is devoid of any indication that the trial court believed imposition of a prison sentence was mandatory.

On the contrary, the probation report made clear that the trial court had a choice to make, stating: "Considering the [d]efendant's suspended state prison sentence, failure to follow his criminal protective order to leave the [v]ictims alone, and threats to kill the [v]ictims and himself, the undersigned respectfully recommends that the defendant's suspended [s]tate [p]rison sentence be imposed." And when defense counsel requested a continuance for preparation of a sentencing memorandum, the trial court did not respond that such a report would be futile because it lacked discretion in the matter, but stated only that counsel's proposed timeframe would not work with the court's schedule. (Compare *Bolian*, *supra*, 231 Cal.App.4th at pp. 1421–1422 [court responded to defense counsel's request that probation be modified and reinstated by stating "it would be 'illegal and improper' to do so"].)

Absent any statement by the trial court suggesting it lacked authority to reinstate or modify Villasenor's probation, we fall back on the general precept that trial courts are presumed on appeal to have properly followed applicable law. (*People v. Thomas* (2011) 52 Cal.4th 336, 361; see *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913 [noting that "scores of appellate decisions . . . have held that 'in the absence of any contrary evidence, we are entitled to presume that the trial court . . . properly followed established law' "]; *People v. Mosley* (1997) 53 Cal.App.4th 489, 496–497 [appellate courts presume trial courts are aware of their sentencing discretion].) We therefore conclude the trial court properly exercised its discretion in this matter and see no abuse of that discretion on this record.

In making this determination, we reject Villasenor's contention that an exercise of discretion cannot be implied on these facts because the trial court failed to provide a statement of reasons for its sentencing choice as required by law.[2] Where imposition of

[2] We acknowledge the Attorney General's claim that Villasenor forfeited this argument by failing to raise it in the trial court. (See *People v. Scott* (1994) 9 Cal.4th 331, 352–353 [adopting rule that "a defendant cannot complain for the first time on

sentence is initially suspended and probation is subsequently revoked, the trial court "must pronounce judgment and sentence and if it chooses to impose a state prison sentence rather than probation it must give a statement of reasons in support of that sentence choice." (*People v. Hawthorne* (1991) 226 Cal.App.3d 789, 794; see *People v. Pennington* (1989) 213 Cal.App.3d 173, 176–177.) In contrast, execution of a previously imposed sentence after revocation of probation is not a " 'sentence choice' " requiring a statement of reasons. (*Cushway, supra,* 193 Cal.App.3d at p. 778; see *Latham, supra,* 206 Cal.App.3d at p. 30 [a statement of reasons is required "at the time a sentence of imprisonment is *imposed*"].) That a statement of reasons was not offered by the trial court in this case thus provides no basis for concluding that the court failed to exercise its discretion as "conferred and compelled" by law. (*Downey, supra,* 82 Cal.App.4th at p. 912.)

We turn finally to Villasenor's claim that the trial court violated his due process rights by denying defense counsel's request to submit a sentencing brief prior to execution of his state prison sentence. At a probation revocation hearing, due process requires that a probationer be accorded a meaningful opportunity to be heard and to explain his or her actions. (*People v. Coleman* (1975) 13 Cal.3d 867, 873.) This right is not limited to denying or defending against a charged violation of the conditions of his or her probation. (*Ibid.*) Rather, "[e]ven where a violation is proven or admitted, a probationer has a due process right to explain any mitigating circumstances and argue that the ends of justice do not warrant revocation." (*Ibid.*) According to Villasenor, he was denied a reasonable opportunity to be heard prior to sentencing in this matter. As discussed below, defense counsel had ample opportunity to argue for a more lenient disposition.

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appeal about the court's failure to state reasons for a sentencing choice"].) Nevertheless, we exercise our discretion to dispense with the argument on its merits.

First, we do not agree with Villasenor's assertion that the trial court denied defense counsel's request to submit a sentencing brief in this matter, thereby depriving him of "any meaningful opportunity to present mitigating facts and expand upon the information found in the Probation Summary Report." After defense counsel requested some time to prepare a sentencing brief and suggested a continuance of "a week or two," the trial court stated: "Actually, I'm in trial and then I'm off on medical leave for an entire month." The court then indicated that it needed to know Villasenor's credits. At that point, it was incumbent on defense counsel to request a different time to file the brief or a different procedure for providing the relevant information to the court, or to argue the merits of his position regarding the appropriateness of reinstating Villasenor's probation. He instead let the matter drop.

Second, the hearing transcript does not indicate a refusal or general unwillingness by the trial court to hear argument from counsel. On the contrary, after defense counsel raised only a single argument with respect to revocation—that there was no competent evidence the protective order at issue had been properly served on his client—the court queried: "Was that your entire argument?" And defense counsel indicated that it was. Even after the court executed the three-year sentence, it asked a series of questions and informed Villasenor that he would be subject to terms and conditions of parole upon his release. When it asked defense counsel if he would stipulate to the return of exhibits, counsel requested that the restraining order be retained, as he would "probably file a notice of appeal on that one issue." On this record, we cannot conclude that the trial court would have denied defense counsel the opportunity to be heard further on the issue of sentencing had he chosen to pursue the matter. We discern no constitutional violation.

## III. DISPOSITION

The judgment is affirmed.

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Sanchez, J.

WE CONCUR:

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Humes, P. J.

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Margulies, J.